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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4374 OF 2005

Shri Gorakh Aba Shinde & Ors. ... Petitioners

Vs.

Namdeo Aba Shinde ... Respondent

Mr. R.V. More for the petitioners.

Mr. S.G. Kudle for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 16TH AUGUST, 2005.

P.C.:-

1. The petitioners are the original defendants. The plaintiff filed a suit for permanent injunction restraining the defendants from causing obstruction to his possession of the suit property. Thereafter, the plaintiff amended his pleadings and claimed relief of possession of the suit property contending that the defendants have forcibly dispossessed the plaintiff. The plaintiff's case rests on a gift deed executed by Thakubai, the grandmother of the plaintiff. The suit was resisted by the defendants. In the written statement, it was contended that the defendants' father Aba was cultivating the suit property as a tenant and after the death of their father, the defendants were cultivating the suit property as tenants. The suit was decreed on 23/2/2001. The defendants preferred an appeal and, in that appeal, the defendants preferred an application

praying that the issue of tenancy be framed and the same may be referred to the Competent Authority under section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short, "the said Act"). The appeal court rejected the said application and, therefore, this writ petition is filed by the original defendants.

2. I have heard Mr. More, the learned counsel appearing for the petitioners and Mr. Kudle, the learned counsel appearing for the respondent. Mr. More drew my attention to Exhibit-183, which is a notice sent by Thakubai to Gorakh Aba Shinde, the father of the defendants. In that notice, it is stated that the father of the defendants is in possession of the suit land. He also drew my attention to section 4 of the said Act and contended that in the circumstances of the case, the defendants are the deemed tenants of the suit land. He also drew my attention to Order 41, Rule 25 and contended that the issue as regards tenancy is essential to the right determination of the suit and the trial court having omitted to frame it, the lower appellate court ought to have framed the issue and referred it to the Competent Authority.

3. I am not impressed with these submissions. The suit is of 1983. Admittedly, during the pendency of the suit, the contentions which are being advanced today were not advanced. No application raising issue of tenancy was made. Exhibit-183, which is the notice issued by

Thakubai, does not help the petitioners. What is stated in the notice is that the father of the petitioners is in possession of the suit land. The possession of Aba as a tenant is not admitted. The claim of the plaintiff rests on the gift deed executed by Thakubai in favour of the plaintiff. No other evidence is produced to substantiate the claim of tenancy. At any rate, such a belated application cannot be entertained. No case is made out for interference. Hence, petition is rejected.

(SMT. RANJANA DESAI, J.)